GREAT EASTERN MILLS BHD

v.

NG YUEN CHING & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[ORIGINATING MOTION NO: R3-25-22-97]
3 APRIL 1998

LABOUR LAW: *Industrial Court - Refusal to adjourn hearing - Whether a breach of natural justice - Failure to give reasons for findings - Whether fatal - Mitigation of damages - Whether applies - Scaling down of compensation and backwages - Whether proper - Jurisdiction of High Court*

LABOUR LAW: *Employment - Workman - Definition - Contract of service - Whether can be implied - Non-payment of EPF and SOCSO - Effect of*

The respondents were employed as lorry drivers by the applicant. They respondents forwarded a claim to the Industrial Court stating that they had been unfairly dismissed by the applicant. The Industrial Court found in their favour. The applicant, dissatisfied with the decision, appealed to this court on the following grounds.

Firstly, that the Industrial Court had committed a breach of natural justice by refusing to allow the request of the applicant's former counsel for an adjournment of the hearing. This resulted in the applicant being denied the opportunity to cross-examine the respondents.

Secondly, that the Industrial Court had erred in law when it considered that the respondents were "workmen", ie, that they were employed under a contract of service, under s. 2 of the Industrial Relations Act 1967 ('the Act').

Thirdly, the Industrial Court had erred when it failed to provide any reasons in concluding that the respondents had been unfairly dismissed.

Fourthly, it was contended that the Industrial Court had failed to limit the award of compensation given.

Held:

[1] The High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. It is only concerned with the decision-making process and not with the decision. It is not the court's function to consider whether on the merits of the facts the decision is fair and reasonable.

[2] There was no substance in the applicant's first complaint. The failure to cross-examine the respondents was due to the applicant's own fault and the fact that its representative declined to cross-examine the respondents when he was present in court. Further, it was its counsel who discharged himself from acting for the applicant.

[3] Determining whether a particular person is a workman under the Act is a mixed question of fact and law and it is a question for the court to decide. Section 2 of the Act provides that a contract of service need not be in writing but can be implied.

[3a] Under s. 30(5) of the Act, technicalities and legal forms are exempted in industrial adjudication. A liberal and not a restricted or rigid interpretation must be adopted and applied in determining whether the respondents were workmen and whether there were contracts of service between the applicant and the respondents.

[3b] The respondents were lorry drivers for the applicant and some of them had been in the applicant's service for more than 20 years. They were paid remuneration or commission according to the trips they made. Their lorries were maintained and fuel was supplied by the applicant. Further, the respondents were insured by the applicant against personal accident. These facts were sufficient to imply that the respondents were employed under a contract of service.

[4] Reasons are important for the findings. However, where they are obvious and unchallenged as in the present circumstances, the failure to provide them will not render the decision defective. Inevitably, the Industrial Court's decision was correct based on the facts.

[5] The doctrine of mitigation of damages does not apply to industrial adjudication. However, the act of scaling down backwages or limiting them to two years because the workman is in gainful employment is not an application of the mitigation principle. The income earned by the workman elsewhere during the period of his enforced unemployment will be a relevant factor in deciding whether to deny or to scale down the quantum of damages.

[6] The Industrial Court had not exceeded its jurisdiction. It had not taken into account irrelevant factors nor did it fail to consider relevant facts. The findings were not perverse and neither were they absurd.

[Application dismissed.]

Cases referred to:
Bata Shoe Co (M) Ltd v. Employees Provident Fund Board [1967] 1 MLJ 120 ***(cit)***
Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(cit)***
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(refd)***
Great Eastern Mills Bhd v. Ng Yuen Ching & Ors [1996] 2 ILR 1818 ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 ***(cit)***
Kuala Lumpur Mutual Fund Bhd v. J Bastian Leo & Anor [1988] 2 CLJ 175 ***(cit)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***
Taylor's College v. Puan Yang Show Fooi & Ors (unreported) ***(cit)***
Wong Yuen Hock v. Sykt Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 29(d), 30(3), (5)
Rules of the High Court 1980, O. 53

Other source referred to:
The Law of Industrial Dispute, OP Malhotra; 4th edn 1985, p 960

For the applicant - Vijayan Venugopal; M/s Shearn Delamore & Co
For the respondents - N Mahalingam; M/s Genga Maha Wong & Co

Reported by Bhawani Mano

JUDGMENT

Nik Hashim J:

The applicant applies for an order of *certiorari* under O. 53 of the Rules of the High Court 1980 to quash the Industrial Court Award No. 609 of 1996 which held that the respondents were workmen and were dismissed by the applicant without just cause or excuse.

The respondents joined the service of the applicant in the capacity of timber lorry drivers and were paid according to the number of trips and the tonnage of the load carried. It is not disputed that the respondents did not enjoy fixed incomes. The respondents contends that they received fixed allowances of RM50 per month, irrespective of whether they worked or not, but the applicant contends such allowances were only payable if the respondents worked for one complete month.

The respondents did not have written contracts and one of the major areas of dispute was whether the respondents were engaged under contract of service (as employees) or under contract for services (as independent contractors).

The facts which were not in dispute are as follows:

(1) no contributions were made to EPF or SOCSO in respect of the compensation received by the respondents;

(2) the respondents were not entitled to annual leave or paid sick leave;

(3) the applicant could take disciplinary action against the respondents (including the termination of their contracts) but no evidence was led of any disciplinary action having been taken against the respondents prior to the dispute;

(4) the applicant provided the lorries as well as fuel, and was responsible for the repairs of the said lorries:

(5) the applicant took out personal accident insurance for the respondents; and

(6) the respondents were never union members and were not governed by the relevant collective agreement between the Timber Employees Union and the applicant.

In 1992, on discovering that no contributions had been made on their behalf by the applicant to the EPF and SOCSO, the respondents lodged a report with the Labour Department on the matter. The Labour Department advised the parties to formalise the terms and conditions of the appointment of the respondents which hitherto had not been reduced into writing. The applicant therefore requested the respondents to sign written contracts. The respondents refused to sign the written contracts and the applicant accordingly terminated their services.

The Minister of Human Resources declined to refer the matter to the Industrial Court and hence the respondents applied to the High Court for an order of *mandamus* to compel the Minister to refer the matter to the Industrial Court.

The Industrial Court adopted the view that the respondents were 'workmen' within the meaning of the Industrial Relations Act 1967 and further held that the dismissal of the respondents were without just cause or excuse, and handed down its decision on 31 December 1996 *vide* Award No. 609 of 1996. The respondents were awarded compensation ie, one month's salary for every year of completed service *in lieu* of reinstatement and full backwages for three years and four months from the date of dismissal to the last date of hearing.

Dissatisfied with the decision of the Industrial Court, the applicant has sought for an order of *certiorari* to quash the whole of the aforesaid decision on four arounds:

(i) the Industrial Court committed a breach of natural justice when it refused to allow the request by the former counsel for the applicant for an adjournment of the hearing on 13 April 1996. Such refusal resulted in the applicant being denied the opportunity to cross-examine the respondents;

(ii) the Industrial Court was wrong in holding that the respondents were 'workmen' within the meaning of the Industrial Relations Act 1967 (the Act);

(iii) the Industrial Court failed to provide any reasons for its finding that the dismissal of the respondents was without just cause or excuse;

(iv) the Industrial Court failed to limit the award of compensation.

It is significant to note at the outset that the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is only concerned with the decision-making process and not with the decision. It is not the Court's function to consider whether on the merits of the facts of the case, the said decision was fair and reasonable.

With regard to the first ground I find there is no substance in the applicant's complaint. The failure to cross-examine the respondents came about as a result of the applicant's own fault and the applicant's representative Mr. Tong Lieh Foh who was then present in court declining to cross-examine them. Accordingly therefore, the Industrial Court did not commit any breach of natural justice when it refused to allow the adjournment after the applicant had closed its case and proceeded with the hearing in the absence of the applicant's counsel. It was the counsel who discharged himself from acting for the company. In the circumstances, the Industrial Court was justified to proceed under s. 29(d) of the Act. The last minute request for an adjournment by the applicant was most unreasonable and was rightly rejected. The law requires that the Industrial Court to make its award without delay (see s. 30(3)).

The second ground is whether the respondents were 'workmen' under the Act. The determination whether a particular claimant is a workman under the Act is a mixed question of fact and law and it is for the Industrial Court to determine this question (see *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304). A contract of service under the Act needs not be in writing. It can be implied (see s. 2). Technicalities and legal forms have no place in industrial adjudication (see s. 30(5). A liberal and not a restricted or rigid interpretation

is to be adopted and applied in determining whether the respondents were workmen and whether there were contracts of service between the company and the respondents (see *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor*. [1996] 4 CLJ 687; [1995] 3 MLJ 369). In the circumstances of this case, there are ample evidence both oral and documentary (see letter at p. 172 of record) before the Industrial Court to support that the respondents were workmen under the Act. They were the lorry drivers for the applicant and some of them were in the service of the applicant for more than 20 years. They were paid remuneration or commission according to the trips they made. Lorries with fuel were provided and maintained by the applicant. The respondents were insured by the applicant against personal accident. Even though there are no written contracts between the applicant and the respondents, these undisputed facts are nevertheless sufficient evidence to imply that there were contracts of service between them. The fact that EPF and SOCSO contributions were not made by the applicant does not prevent the respondents from becoming workmen under the Act as their non-payment is not conclusive that they were not workmen (see *Kuala Lumpur Mutual Fund Berhad v. J. Bastian Leo & Anor*. [1988] 2 CLJ 175; [1988] 2 MLJ 526 SC). Similarly, the applicant's contention that the respondents had engaged attendants and paid them which suggest that the respondents' contract with the applicant was a contract for service, is also not conclusive. Employing attendants by the respondents, does not necessarily constitute the respondents independent contractors (see *Bata Shoe Company (M) Ltd. v. Employees Provident Fund Board* [1967] 1 MLJ 120). Thus, in the circumstances, the Industrial Court's finding that the respondents were workmen is justified on facts and therefore correct in law.

Respecting the third ground, counsel for the applicant argued that the Industrial Court had failed to give reasons for finding that the dismissal was without just cause or excuse and quoted two Federal Court cases of *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* [1981] 2 MLJ 129 and *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753 to emphasise the importance and the need for the Industrial Court to determine whether a termination is with or without just cause or excuse. In the present case, the Industrial Court at para. 36 p. 275 of record concluded by saying:

> I also hold that the dismissal of the claimants (respondents) by the company (applicant) is without just cause and excuse.

Counsel for the respondents while admitting that there were no reasons given by the Industrial Court for such finding, submitted that the evidence before the Industrial Court was so overwhelmingly clear that any reasonable tribunal similarly circumstanced as the Industrial Court would have come to one conclusion, ie, the termination was without just cause or excuse and unlawful. With respect, I agree with his submission. It is not disputed that the applicant dismissed the respondents on 8 October 1992 purely on the ground that they had refused to sign the agreement (CL – pp. 1 – 3). Morever, the applicant in its statement in reply has not pleaded that if the respondents were workmen and if there is a dismissal, it is with just cause or excuse. All that is pleaded in para. 5 of the statement in reply is that:

> Paragraph 5 of the statement of case is denied. The Company (Applicant) maintains that it was a contract for service, that the claimants (Respondents) were not employees and that they were not dismissed or at all.

It is trite law that a party is bound by its pleading (*R. Rama Chandran v. Industrial Court of Malaysia & Anor.* [1997] 1 CLJ 147; [1997] 1 MLJ 145 FC). There was no challenge to the dismissal letter by evidence or by the pleadings. It is for this reason that the Industrial Court did not go into the reasons for the termination. In my view, though reasons are important for the findings, failure to provide reasons in the particular circumstances of this case is not fatal. The reasons for the dismissal is so obvious and unchallenged. Therefore, based on the evidence, the Industrial Court's conclusion that the respondents' dismissal was without just cause or excuse, is inevitable.

Next, I deal with the award of compensation and backwages which the Industrial Court awarded from the date of dismissal to the last date of hearing. It is pertinent to note that counsel for the applicant who appeared before the Industrial Court (not the one before me) urged the court in his written submission (p. 251 of record) not to order reinstatement in the event the respondents were dismissed without just cause or excuse as 'the relationship between the company (applicant) and the claimants (respondents) is strained that they would, most probably not be able to work along anymore. The Industrial Court thus proceeded to hold that reinstatement was not the right remedy.

Before me counsel for the applicant submitted that the applicant is entitled to remission on the award of compensation because the delay in the disposal of the case was not entirely due to the applicant's fault. The delay was partly due to the Minister of Human Resources who declined to refer the matter to the Industrial Court for an order of *mandamus* to compel the Minister to refer the matter.

My short response to that argument is that the respondents cannot be held responsible for the delay for which they had no control. In this case, there is no evidence that the respondents contributed to the delay. The respondents had fought for their rights all along. Therefore, the question of remission does not arise.

The doctrine of mitigation of damages does not apply to industrial adjudication (see *Taylor's College v. Puan Yang Show Fooi & 2 Ors.*, Kuala Lumpur High Court, Civil Appeal No. R8-16-11 of 1987, unreported). However, scaling down the backwages or limiting it to two years because the workman was in gainful employment is not an application of the mitigation principle. The income earned by the workmen elsewhere during the period of his enforced unemployment will be the relevant factors to be taken into account in denying or scaling down quantum of backwages (see *The Law of Industrial Dispute* by O.P. Malhotra 4th Edn. 1985 p. 960). But, in the present case, there is no evidence that the respondents were usefully employed elsewhere during the period of the enforced unemployment. Accordingly, there is no question of limiting the backwages. On the facts and circumstances of this case, I am satisfied that the compensation and backwages are rightly awarded and therefore should not be disturbed.

In the light of the foregoing, I find that the Industrial Court, in arriving at its decision, had not exceeded its jurisdiction. It had not taken irrelevant factors into consideration. Neither it failed to take relevant factors into consideration. Its findings are not perverse. Neither its results are absurd. Even assuming that the award contains one or more errors upon its face, for example the error at para. 8 p. 263 of the record, concerning the finding of COW5's testimony against his recorded evidence, such error, in my opinion, is of no consequence on the Industrial Court's finding that the respondents were workmen as there are other valid grounds to support that finding. The error or errors did not give the High Court jurisdiction to quash the decision of the Industrial Court (see *Dr. A. Dutt*, at p. 170, *supra*,). Be that as it may, I find there is no miscarriage or justice in this case. This court is concerned with the ultimate decision. If the ultimate decision is found to be correct, then *certiorari*, being only a discretionary remedy, cannot be granted (see *Hoh Kiang Ngan*, pp. 393, 394 *supra*). On the evidence, the award is correct and justified.

For these reasons, I dismiss the application with costs.